

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al.,)	
)	
Plaintiffs,)	05-CV-0329 GKF-SAJ
)	
v.)	
)	
Tyson Foods, Inc., et al.,)	
)	
Defendants.)	
)	

THE CARGILL DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF THEIR MOTION TO COMPEL

The Cargill Defendants respectfully request this Court to compel the State to fully answer the discovery served by Cargill in August 2006. Plaintiffs' Response tries to avoid the deficiencies in their discovery responses by attributing arguments to the Cargill Defendants that they did not in fact make, and then knocking down these straw men to "prove" compliance. The issue before the Court is whether Plaintiffs have adequately responded to the Cargill Defendants' unique discovery requests, not how the Plaintiffs have responded to "the Poultry Integrators" in general. The record shows that Plaintiffs' responses to the Cargill Defendants' discovery fails under any fair test of adequacy.

II. ARGUMENT

Plaintiffs' Response fails to justify either the form or the substance of their discovery responses in any of the areas raised in the Cargill Defendants' Motion.

A. The State's Document Production is Insufficient.

A responding party is required to address each item or category in the request for production. Fed. R. Civ. P. 34(b). The State may produce responsive documents "as they are kept in the usual course of business . . ." *Id.* The Rule is designed to "to prevent parties from "deliberately . . . mix[ing] critical documents with others in the hope of obscuring significance." Fed. R. Civ. P. 34 advisory committee note (1980); *see also Johnson v. Kraft Foods N. Am., Inc.*, 236 F.R.D. 535, 540 (D. Kan. 2006).

As discussed fully in the Motion, the State's method of bankers box production – with charts that generally refer to numerous boxes that may contain some documents responsive to numerous document requests but also contain sometimes huge volumes of

unresponsive material – makes it impracticable to determine which documents are responsive to which request for production and impossible to determine which documents are responsive to which Rule 33(d) interrogatory. As the Court remarked in its February 26 Opinion and Order regarding the Tyson Defendants’ Motion to Compel, these indices by the State do not reference specific page numbers, bates numbers, or documents in boxes. (Doc. No. 1063 at 6.) Plaintiffs represent that they have identified and pulled for inspection responsive documents, and deny that they have intentionally included non-responsive documents in their productions. Yet the form in which they have chosen to produce documents has led to volumes of non-responsive information enmeshed with responsive documents, a labyrinth with a faulty map, in violation of Rules 34 and 33(d).

Plaintiffs attempt to meet their burden of showing they produced state agency documents in the usual course of business through affidavit testimony. However, the affidavits proffered by the State do nothing to cure the deficiencies in Plaintiffs’ document production. To the contrary, a close reading of the affidavits actually supports the Cargill Defendants’ Motion to Compel. Each affiant states that he or she “supervised the collection of documents which were responsive to the Poultry Integrator’s Interrogatories and Requests for Production of Documents which were served on [that particular agency].” (Affs. ¶ 2.) Plaintiffs’ attempt to use this statement to address the Cargill Defendants’ requests is highly misleading. Only Defendant Peterson Farms actually served Requests for Production directly on the agencies. The Cargill Defendants

did not. The affidavits, therefore, offer nothing to suggest that any state agency has ever even seen Cargill's requests, much less conducted a search based on them.

Indeed, the affiants' deposition testimony demonstrates that no such search could have occurred. Ben Pollard of the Oklahoma Conservation Commission's ("OCC") administrative division testified that he had never seen Cargill or CTP's interrogatories or document requests. The only requests to which he was asked to respond were Peterson's. (*See* Ex. 1, Pollard Dep. at 113:4–115:8.) Shannon Phillips, addressing documents maintained by the OCC's Water Quality Division, testified that she had not seen any discovery other than the Peterson requests and did not know if the documents being produced by the OCC were responsive to any other requests. (*See* Ex. 2, Phillips Dep. at 117:2–11: "Q . . . [H]ave you seen any discovery from any other defendant or party in this litigation other than the Peterson requests that we've discussed here today? A. No. Q. So you don't know if the documents that are being produced here are responsive to any other discovery requests other than those that we've discussed with respect to Peterson? A. No.")

The Oklahoma Scenic Rivers Commission's Ed Fite likewise testified that he had not read or reviewed the Cargill Defendants' interrogatories or document requests (*See* Ex. 3, Fite Dep. at 155:16-21), and was not involved in producing or pulling documents responsive to the Cargill Defendants' discovery requests (*id.* at 154:12-18). Dean Couch of the Oklahoma Water Resources Board ("OWRB") believed that he received copies of all of the discovery requests issued by all the parties in the case. (*See* Ex. 4, Couch Dep.

at 194:9-13.) He stated that he participated in the process of identifying documents responsive to the requests for production, but did not believe that he participated in the process of finding answers to interrogatories served upon the State. (*Id.* at 195:23–196:14.)

Rhonda Craig of the Oklahoma Department of Environmental Quality (“ODEQ”) mistakenly states that the “the Poultry Integrator lawyers deposed me.” (Craig Aff. ¶ 6.) In fact, only Defendant Peterson deposed Ms. Craig, with the other Defendants present. Peterson asked Ms. Craig only about responses to Peterson’s own discovery. (*Cf. id.*) The State refused to provide Ms. Craig for more than seven hours and Defendant Peterson’s questioning consumed nearly the entire time provided. As a result, the Cargill Defendants were unable to ask any questions of Ms. Craig, and could only make a record to preserve their rights to notice this witness later. (*See* Ex. 5, Craig Dep. at 210:6-17.)

Moreover, although the OCC’s Pollard states in his affidavit states that he testified at his deposition that “I told [the Poultry Integrator lawyers] where documents were located by box and file for each Request for Production,” Pollard Aff ¶ 7, he actually testified that he had not reviewed the Cargill Defendants’ document requests or interrogatories. (*See* Ex. 1, Pollard Dep. at 113:4–115:8.)¹ Mr. Couch’s affidavit makes

¹ Further, during the deposition Mr. Pollard could only address the general location even of documents responsive to Peterson’s requests for production. Mr. Pollard identified multiple boxes as containing documents responsive to Peterson’s requests, but could not identify specific boxes containing responsive documents. (*See* Pollard Dep. at 25:8-17.)

the same assertion, Couch Aff. ¶ 8, even though only Defendant Peterson's counsel questioned Mr. Couch about specific document requests.

Thus, at best, only a single agency custodian even read the Cargill Defendants' document requests, and no custodian averred that he or she supervised the collection of documents responsive to the unique requests of the Cargill Defendants. Likewise, no custodian reviewed the Cargill Defendants' interrogatories, despite the fact that the State liberally invoked Rule 33(d) in responding to those interrogatories.

B. The State's Responses to Interrogatories Are Deficient.

The State's interrogatory responses are not adequate. Rather than provide a complete narrative answer, the State cited Rule 33(d)'s business record option in response to several interrogatories. To utilize that Rule, a responding party "must ... specifically designate what business records answer each interrogatory." *Pulsecard, Inc. v. Discover Card Servs.*, 168 F.R.D. 295, 305 (D. Kan. 1996). To satisfy the specificity mandate, a respondent should list exact documents and even indicate the page or paragraphs that are responsive to the interrogatory. *Colorado v. Schmidt-Tiago Constr. Co.*, 108 F.R.D. 731, 735 (D. Colo. 1985). If a party is unable to so comply with the strictures of Rule 33(d), "it must otherwise answer the interrogatory fully and completely." *Oleson v. K-Mart Corp.*, 175 F.R.D. 560, 564 (D. Kan. 1997). Here, Plaintiffs have never even attempted – on their indices or otherwise – to identify the documents they claim provide responses to the Cargill Defendants' interrogatories.

The State has asserted serious claims against the Cargill Defendants, and Rule 33(d) does not permit the State to force the Cargill Defendants to guess at the basis of those claims. (*See* Mot. Ex. E to Aff., Ex. 5.) “The defendant is entitled to know the factual basis of plaintiff’s allegations and the documents which the plaintiff intends to use to support those allegations.” *Cont’l Ill. Nat’l Bank & Trust Co. v. Caton*, 136 F.R.D. 682, 684 (D. Kan. 1991). For that reason, “answers to interrogatories must be responsive, full, complete and unevasive.” *Id.* (quotation omitted). The Cargill Defendants do not contend that the State has failed to put words on paper so as to “answer” interrogatories. (*See* Mem. Resp. at 13.) Rather, the Cargill Defendants have contended that the State has failed to provide full, complete, and unevasive interrogatory answers as required. (Mot. at 10-12.) If Plaintiffs can direct the Cargill Defendants to the portions of documents that provide the answers to Cargill’s questions, they must do so. If they cannot, Plaintiffs must provide narrative answers. To date, they have done neither.

Given the nature of the interrogatories, the State should easily be able to provide more complete interrogatory answers. For example, the State should be able to identify some witnesses with responsive information. (*See* Mem. Resp. at 14-15.) The State should be able to offer more than generic report references in response to CTP Interrogatory No. 7. (*Id.* at 17.) The State should be able to fully answer Cargill Interrogatory No. 9, rather than just improperly referring back to the complaint.

The Court should also reject the State’s blanket claim of irrelevancy as to any question regarding when Plaintiffs became aware of alleged violations. (*Id.* at 16.) For

example, a timeline of allegations could greatly assist in evaluating the statute of limitations, determining the divisibility of harm, and identifying possible alternate sources for the materials of which the State complains.

Further, as noted in this Court's February 26 Order on the Tyson Defendants' Motion to Compel, answering an interrogatory that requests specific information regarding alleged violations by essentially "stating that the violations occur wherever a violation has occurred . . . does not provide useful information" and is improper. (Doc. No. 1063 at 10-11.) Similarly here, the Court should order the State to provide non-circular answers to the Cargill Defendants' interrogatories seeking specific information regarding the seven compounds / constituents and the public health and welfare issues at the heart of this case. (*Cf.* Mem. Resp. at 15-16, 18-19.)

The Court should likewise reject the State's improper refusal to address the Cargill Defendants' timely contention interrogatories. As the Court also recognized in its Order on the Tyson Motion to Compel, Plaintiffs' continued refusal to fully answer contention interrogatories is unacceptable. (Doc. No. 1063 at 6-7.) Although the State may claim difficulty in adequately responding to these contention interrogatories, "the fact that something is difficult does not excuse a response." (*Id.* at 7.) The Cargill Defendants are entitled to full, complete, and unevasive interrogatory responses.

C. The State's Privilege Logs Are Insufficient.

The State's privilege logs objectively fail on various grounds. The logs do not permit the Cargill Defendants to evaluate the validity of the State's privilege claims

because the log entries are incomplete and fail to indicate all claimed attorney recipients. Plaintiffs also refuse to provide the end dates for their privilege log entries. Although Plaintiffs indicate in their Response that they had agreed to review and supplement the deficient logs, Plaintiffs have not told the Cargill Defendants how or when they intend to supplement their logs, and have yet to provide any such supplementation. (*See* T. Hill Aff. Supp. Mot. ¶ 9.)

Further, Plaintiffs cannot defend their generic claims of privilege against Cargill's request for the production of obviously non-privileged documents, including maps and photographs of the IRW, communications with third parties and governmental entities, and complaints. The Court should compel the State either to indicate the specific bases for the claimed privileges or to withdraw these generic claims of privilege.

The State also improperly claims work-product and trial-preparation-materials protection against the Cargill Defendants' interrogatories seeking the basis for statements the State has made to the Court. After the December 15, 2006 hearing, this Court ruled that Plaintiffs waived any work product or trial preparation protection by placing such information "at issue." Thus, the Cargill Defendants ask the Court to compel the State to provide responsive information and remove any objection based on work product or trial preparation protection to CTP Interrogatory Nos. 4-9, 13-15 and Cargill Nos. 1-17.

Finally, Plaintiffs argue that their production contains only obvious redactions, eliminating any need for a redaction log. However, the production includes documents with large amounts of white space that may or may not be redactions. (*See, e.g.* Ex. 6,

ODEQ 066-0000311.) Because Plaintiffs have not provided a redaction log, the Cargill Defendants are unable to determine whether anything or what sort of information has been redacted from such documents. In their response, Plaintiffs now represent that they have redacted only social security numbers, personnel information, bank account numbers, and complainants' identifiers. (Mem. Resp. at 22.) If the State can confirm this representation as true (with, for example, the affidavit of a person with knowledge), the Cargill Defendants will withdraw this portion of their Motion.

D. The State's "General Objections".

The Court should compel the State to remove General Objections under which no documents were withheld. (Mot. at 17.) In their Response, Plaintiffs provide small concessions on this point, averring that they have withheld no information based upon General Objection 2/G (documents the Cargill Defendants may have), and that under General Objection 2/E (third party sources) they have withheld only information regarding the State's ownership of real property. (Mem. Resp. at 24.) Given the importance of determining the State's ownership interest in property within the IRW, the Court should strike General Objection 2/E and direct the State to provide this withheld responsive information.

The Court should also strike General Objection 3/B that CTP Interrogatory Nos. 3 and 4 and Cargill Interrogatory Nos. 9, 10, and 11 would be overly expensive to answer and are overly burdensome. The State has provided no detail regarding the claimed

expense or burden and no factual support for the assertions, and the objection is therefore improper. *See Gheesling v. Chater*, 162 F.R.D. 649, 650 (D. Kan. 1995).

III. CONCLUSION

The State's objections to the Cargill Defendants' discovery requests are improper and the responses inadequate. The Cargill Defendants respectfully request that this Court compel Plaintiffs to supplement their discovery responses consistent with the Motion to Compel and as detailed in the Cargill Defendants' Proposed Order.

Respectfully submitted,

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